

MSK

MURPHY
SULLIVAN
KRONK

Via U.S. Mail

November 7, 2013

Richard W. Haesler, Jr., Esq.
City Attorney's Office
City Hall
149 Church Street
Burlington, VT 05401

**Re: 41 Cherry Street, LLC
Hotel Vermont**

Dear Richard:

As you know, I represent 41 Cherry Street, LLC, the developer of Lot A in the Westlake Area Condominium – now known as Hotel Vermont.

Upon completion of the Hotel, the developers discovered that the projection onto the Cherry Street right of way, over the front door of Hotel Vermont, exceeds the easement for the overhang that is set forth in the Ground Lease between the City and 41 Cherry Street, LLC, by a few inches.

This was discovered by the surveyor who completed an ALTA survey of the improvements, as-built. NBT Bank, the lead lender on the project, insists that the ALTA survey show no encroachments.

It is the hope of 41 Cherry Street, LLC that the City of Burlington will consider a request to amend the easement for the projection so that it is compliant with the Ground Lease.

The easement for the projection is 36 feet by 13 feet. The as-built dimensions of the projection are just under 49 feet by 14 feet. The as-built dimensions were approved by all permitting authorities. We request that the new easement read 49 feet by 14 feet.

I have submitted a draft of the Third Amendment to Ground Lease for your consideration, and accompanying documents.

I look forward to hearing from you.

{00112151.1}

275 COLLEGE STREET, PO BOX 4485 • BURLINGTON, VT 05406-4485 • PHONE 802 861-7000 • FAX 861-7007 • MSKVT.COM

- 2 -

Thank you.

Very truly yours,



Catherine Kronk

Murphy Sullivan Kronk

275 College Street, Burlington, VT 05401

Phone: (802) 861-7000 | Cell: (802) 233-7421

ckronk@mskvt.com

(00112151.1)

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BOF: Councilors:

41 CHERRY STREET LLC:
AMENDMENTS TO GROUND LEASE, AND
NOTICE OF LEASE

In the year Two Thousand Thirteen.....

Resolved by the City Council of the City of Burlington, as follows:

That WHEREAS, the CITY declared and established a condominium known as the Westlake Area Condominium located in the City of Burlington, Vermont as described in the Master Declaration Westlake Area Condominium dated July 27, 2005 and recorded in Volume 925 at Page 709 of the City of Burlington Land Records (the "Declaration"); and

WHEREAS, the Unit Owner to Unit A of the Westlake Area Condominium, 41 Cherry Street, LLC, has constructed a hotel, i.e. Hotel Vermont, consistent with all plans as permitted for the property at 41 Cherry Street in Burlington, Vermont (the "Project"); and

WHEREAS, upon completion of the Project the Unit Owner has discovered that, although the permits allow for it, the Project's awning over the public right-of-way on Cherry Street inadvertently exceeds the easement for such projection as stated in the Ground Lease by a few feet; and

WHEREAS, the December 1, 2008 Ground Lease as between the City and 41 Cherry Street, LLC, is therefore in need of what shall be a third amendment in order to memorialize a more specific measurement change pertaining to the projection easement (from 13' by 36' to 14' by 49') for the existing, as-built awning over the Cherry Street public right-of-way ; and

WHEREAS, a Fourth Amended and Restated Notice of Lease is needed for purposes of recording the above referenced Third Amendment to the Ground Lease; and

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WHEREAS, 41 Cherry Street, LLC, presented each of the above referenced documents to the Board of Finance on November 12, 2013 and the Board of Finance unanimously recommended that the full City Council authorize Mayor Weinberger to execute each of the attached documents, with allowance for any necessary minor changes, subject to the review and approval of the City Attorney.

NOW THEREFORE BE IT RESOLVED that Mayor Miro Weinberger is hereby authorized to execute a Third Amendment to Ground Lease, and a Fourth Amended and Restated Notice of Lease, each in substantial conformance to the above-referenced attachments, subject to the review and approval of the City Attorney.

DRAFT

THIRD AMENDMENT TO GROUND LEASE

This Third Amendment to Ground Lease is by and between the City of Burlington ("Landlord") and 41 Cherry Street, LLC ("Tenant") and is made as of November 1, 2013.

WHEREAS, the Landlord and the Tenant entered into a Ground Lease with respect to real property located at 41 Cherry Street in Burlington, Vermont and dated as of December 1, 2008, as amended by the First Amendment to Ground Lease between the Landlord and the Tenant, dated as of July 5, 2011, and the Second Amendment to Ground Lease dated as of August 1, 2012 (together, the "Lease"); and

WHEREAS, the description of the Property or Leased Premises in the Lease requires a minor amendment in order to provide an accurate measurement of an easement in favor of the Tenant over the Cherry Street public right-of-way; and

WHEREAS, the parties desire to amend the Lease to amend the Legal Description of the Property and the Leased Premises as set forth in Exhibit A to the Lease.

NOW THEREFORE, the parties hereto agree as follows:

1. **Easement over Cherry Street.** Section 2(3) of Exhibit A to the Lease containing "Legal Description of Property and Leased Premises 41 Cherry Street, Burlington, Vermont" shall be deleted and replaced by the following:

Easement forty-nine feet (49') in length on the northerly boundary of Unit A and extending fourteen feet (14') over the Cherry Street public right-of-way and to be for the purposes of projections from Unit A, including, without limitation, for wall mounted signage, awnings and doors that may be constructed or installed from time to time, and footings.

2. **Exhibit A.** Exhibit A to the Lease "Legal Description of Property and Leased Premises 41 Cherry Street, Burlington, Vermont" shall be deleted and replaced by Exhibit A attached hereto.
3. **Defined Terms.** All capitalized terms used herein shall have the meanings set forth in the Lease unless otherwise defined herein. The term "Premises", as used in the Lease, shall have the same meaning as "Leased Premises" and "Property".
4. **Notice of Lease.** The Notice of Lease filed in the Burlington land records shall be amended in order to take into account this Third Amendment to Lease.
5. **Amendment.** All terms of the Lease not amended hereby shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have executed this Second Amendment to Ground Lease as of the day and date first set forth above.

City of Burlington

By: _____
Miro Weinberger, Mayor

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS

On this ____ day of November, 2013, in the City of Burlington, personally appeared Miro Weinberger, Mayor of the City of Burlington, to me known to be the person who executed the foregoing instrument, and he acknowledged this instrument, by him signed, to be his free act and deed and the free act and deed of the City of Burlington.

Before me, _____
Notary Public
My commission expires: 2.10.15

41 Cherry Street, LLC

By: _____
Charles DesLauriers, Manager

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS

On this ____ day of November, 2013, in the City of Burlington, personally appeared Charles DesLauriers, Manager of 41 Cherry Street, LLC, to me known to be the person who executed the foregoing instrument, and he acknowledged this instrument, by him signed, to be his free act and deed and the free act and deed of 41 Cherry Street, LLC.

Before me, _____
Notary Public
My commission expires: 2.10.15

Exhibit "A"

Legal Description of Property and Leased Premises
41 Cherry Street, Burlington, Vermont

The Property or Leased Premises consist of:

1. Unit A of the Westlake Area Condominium as more fully described in the Master Declaration Westlake Area Condominium ("Condominium") dated July 27, 2005 and recorded in Volume 925 at Page 709 of the Burlington Land Records as amended by First Amendment to Master Declaration dated as of August 1, 2012 to be recorded in the City of Burlington Land Records ("Master Declaration"). All defined terms used below are as defined in the Master Declaration.

Without limiting the foregoing, it is noted that the Property is subject to and has the benefit of those easements and rights-of-way and covenants, as shown on said Plats and Plans and as set forth in the Master Declaration, including but not limited to the following:

The sixty (60) foot right-of-way for ingress and egress to Unit B and across Unit A is limited to ten (10) feet in height, and the owner of Unit A is granted the vertical air rights above the right-of-way and the right to develop or construct within those vertical air rights so granted; and

The horizontal boundaries of Unit A and Unit B are the above described metes and bounds, the upper vertical boundary is one hundred thirty feet (130') above the surface of the land and the lower vertical surface is fifty feet (50') below the surface of the land.

2. Easements upon and over Units B and C-2 and the Cherry Street right-of-way as shown on the plan attached hereto as Exhibit A-1, and described as follows:

1. Easement over and upon Unit B being a twelve foot (12') by ninety five foot (95') easement as shown on the plan attached hereto as Exhibit A-1, which easement is for the purposes of constructing a building and improvements in the airspace above the existing wall of the garage on Unit B (elevation 196.97' +/- ASL) and to construct necessary footings and piers to support the structure to be built on Unit A and on or over the easements areas over or upon Units B and C-2; and

2. Easement over and upon Unit C-2 measuring 17.27 feet by 72 feet, more or less, as shown on the plan attached hereto as Exhibit A-1, which easement is for the purposes of constructing a building and improvements in the airspace beginning approximately 7'2" above the finished grade of the existing ramp of the garage and to construct necessary footings and piers to support the structure to be built on Unit A and on or over the easements areas described.

3. Easement forty-nine feet (49') in length on the northerly boundary of Unit A and extending fourteen feet (14') over the Cherry Street public right-of-way and to be for the purposes of projections from Unit A, including, without limitation, for wall mounted signage, awnings and doors that may be constructed or installed from time to time, and footings.

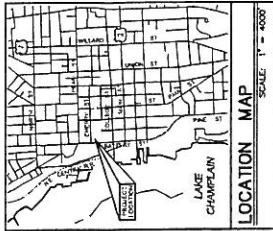
4. Easement forty-five feet (45') in length on the easterly boundary of Unit A and extending five feet (5') into the airspace of Unit B of the Westlake Area Condominium at least eight feet and four inches (8' 4") above the grade of the walkway between Unit A and what is now Macy's, which easement may be for the purposes of the construction, maintenance, repair and replacement of buildings and improvements attached to or a part of the buildings and improvements to be built on Unit A.
5. Easement and right-of-way on, under and along the Cherry Street public right-of-way and on, under and along the walkway between Unit A and what is now Macy's, which is a portion of Unit B of the Westlake Area Condominium for the installation, operation, maintenance and repair of all utilities serving the Benefited Parcel, including without limitation water, sewer, stormwater, electricity, cable, fiber optics and telephone lines, pipes, poles and conduits, and all other utilities that are or may be laid, installed or constructed from time to time to serve Unit A, including without limitation those shown on the Plats and Plans attached to the Master Declaration of the Westlake Area Condominium.
6. 2' X 60' easement for a foundation wall and overhead structure on Unit A onto Unit C-2, as is more particularly described in paragraph 6 of the First Amendment to Master Declaration Westlake Area Condominium dated as of the 1st day of August, 2012 and to be recorded in the City of Burlington Land Records contemporaneously herewith.
3. An easement over and upon the Cherry Street public right-of-way, adjacent to the northerly boundary line of Unit A, for the construction, maintenance and use of an entranceway for vehicles for guests and invitees accessing the Building, as is more particularly shown on Exhibit A-2 attached hereto.
4. An easement and right-of-way for the benefit of Unit A extending 46.33 feet by 60 feet from Unit A onto Unit C-3, as is more particularly described in paragraph 1 of the First Amendment to Master Declaration Westlake Area Condominium dated as of the 1st day of August, 2012 and to be recorded in the City of Burlington Land Records contemporaneously herewith.

Unit A and the foregoing easements referred to herein as "the Property" or "Leased Premises".

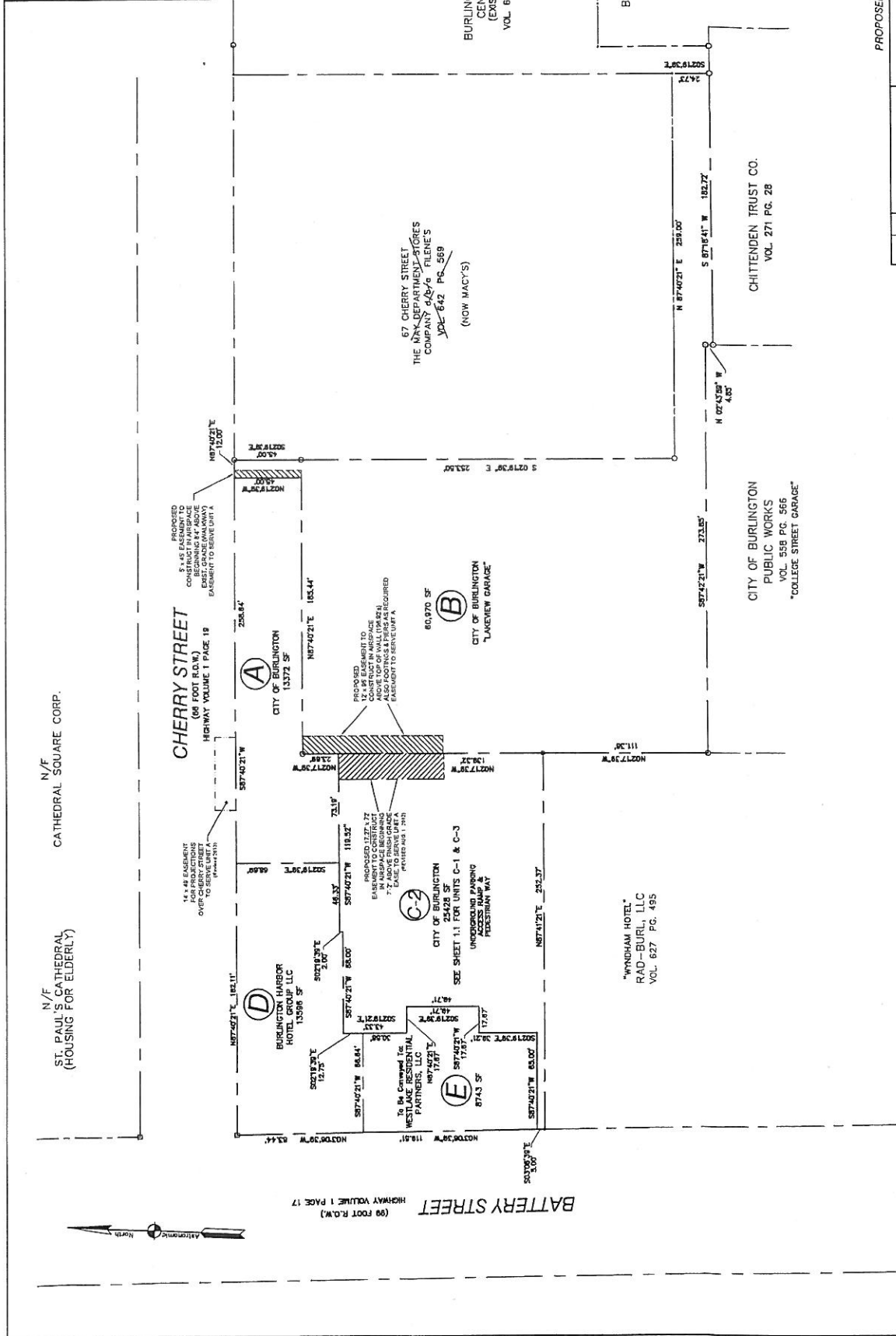
DRAFT

Exhibit A-2
See Attached Plan

DRAFT



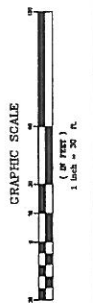
SCALE: 1" = 400'



PROPOSED ADDITIONAL EASEMENTS			
11.09.15	TIC	AMING EASEMENT ON CHERRY ST.	
8.01.13	TIC	CORRECT MORT EASEMENT ON C-2	
8.10.08	TIC	RAISE EASEMENT HEIGHT IN C-2	
8.23.08	TIC	PROPOSED EASIES, UPDATE NAMES	
Revision			
Date	CHVE	Revision	
Drawn by	AC/JPB	Date	JUNE 23, 2005
Checked by	TIC	Scale	1" = 30'
Approved by	JDE	Project No.	02285.03

This plan was prepared solely to depict a REVISION of a certain easement over a portion of the C-2 to serve Unit A. Basing boundaries shown as a collection of lines and points, and not as a single line or point, is not intended to be in full compliance with 22A VSA Section 2-109 "Plat and Plat". This statement valid only when accompanied by my original signature and seal below.

Timothy R. Gowan, V.T.L.S. 597 Date



UNIT BOUNDARIES			
UNITS A, B, C-2, D, & E			
CIVIL ENGINEERING ASSOCIATES, INC.			
20 HANDED NEW LANE, SOUTH BURLINGTON, VERMONT			
VT 0540333 TEL 802-244-2721 FAX 802-244-2722			
SHEET			
1.0			

FOURTH AMENDED AND RESTATED NOTICE OF LEASE

KNOW ALL PERSONS BY THESE PRESENTS, that **THE CITY OF BURLINGTON**, a Vermont municipality (the "Landlord"), and **41 CHERRY STREET, LLC**, a Vermont limited liability company with a principal place of business in Burlington, Vermont (the "Tenant"), have entered into Lease dated as of December 1, 2008 and amended by First Amendment to Ground Lease dated as of July 5, 2011, Second Amendment to Ground Lease dated as of August 1, 2012, and Third Amendment to Ground Lease dated as of November 1, 2013 (collectively, the "Lease"), with respect to certain lands and premises known as **Unit A and a portion of Unit B, Units C-2 and C-3 of the Westlake Area Condominium, Burlington, Vermont, with an address of 41 Cherry Street, Burlington, Vermont as more particularly described on Exhibit A attached hereto (the "Leased Premises")**.

WHEREAS, the parties hereto have filed a Notice of Lease dated as of December 1, 2008 and recorded in Volume 1050 at Page 512 of the City of Burlington Land Records, an Amended and Restated Notice of Lease dated May 29, 2012 and recorded in Volume 1175 at Page 191 of the Land Records, a Second Amended and Restated Notice of Lease dated June 8, 2012 and recorded in Volume 1178, at Page 495 of the City of Burlington Land Records, and a Third Amended and Restated Notice of Lease dated as of August 1, 2012 and recorded in Volume 1184 at Page 305 of the City of Burlington Land Records; and

WHEREAS, the parties hereto wish to replace the Third Amended and Restated Notice of Lease with this Fourth Amended and Restated Notice of Lease.

NOW THEREFORE, the parties agree as follows:

This Fourth Amended and Restated Notice of Lease replaces the Third Amended and Restated Notice of Lease referred to above.

The following information accurately reflects the agreement between the parties contained in the Lease:

1. The current Landlord and Tenant are listed above.
2. The date of execution of the Lease is as of December 1, 2008.
3. The term of the Lease shall be for a period of forty nine (49) years commencing on December 1, 2008 and terminating at midnight on December 31, 2057. Unless terminated, the Lease renews automatically at the end of the Lease Term and each successive Lease Term for an additional 49 year term unless the Tenant terminates the Lease.
4. The Property or Leased Premises subject to the Lease is described on **Exhibit A** attached hereto.
5. In addition to those permitted in the Lease, the Permitted Improvements shall also include the improvements to be undertaken by Tenant to the sidewalk and road surface in the Cherry Street right-of-way in order to construct the entranceway for vehicles for guests and invitees accessing the Building.
6. The Lease contains the following restrictions on assignment of the Lease:

"Section 11. **Assignment and Subletting.**

(a) Tenant shall have the right at any time to sublet the whole or a portion of the Property or to assign or mortgage this Lease, without Landlord's prior written approval, and upon the condition that all rights acquired by a third party hereunder shall be subject to each and all of the covenants, conditions or restrictions set forth in this Lease. At least fifteen (15) days prior to the execution by Tenant of any assignment agreement, Tenant shall deliver to Landlord a copy of the proposed final form thereof, which shall contain, in a form acceptable to Landlord, a covenant on the part of the assignee to assume all the obligations of Tenant. Any sublease agreement shall contain a provision that it is subject to all of the terms, covenants and conditions of this Lease and shall not contain provisions inconsistent with the terms of this Lease.

(b) Tenant shall, without Landlord's consent but upon prior written notice, have the right to assign this Lease to any entity controlled by, which controls or which is under common control with Tenant."

7. This Fourth Amended and Restated Notice of Lease will be recorded in the land records of the City of Burlington and is intended to provide notice to third parties of the Lease. The Lease contains terms and conditions in addition to those set forth in this Notice of Lease. Capitalized terms not otherwise defined herein shall have the meaning defined in the Lease. This Third Amended and Restated Notice of Lease is not intended to amend or modify the terms and conditions of the Lease. To the extent that the terms and conditions of this Third Amended and Restated Notice of Lease differ from the terms and conditions of the Lease, the terms and conditions of the Lease shall govern and prevail. An original Lease is located at the offices of the Landlord and of the Tenant.

8. Tenant has a right of first refusal with respect to the Property.

9. The parties' notice addresses are as follows:

If to Landlord: City of Burlington
Attn: Mayor
149 Church Street
Burlington, Vermont 05401
Telephone: (802) 865-7272
Facsimile: (802) 865-7270

with a copy to: City Attorney
149 Church Street
Burlington, Vermont 05401
Telephone: (802) 865-7121
Facsimile: (802) 865-7123

If to Tenant: 41 Cherry Street, LLC
25 Cherry Street
Burlington, Vermont 05401
Telephone: (802) 864-4709
Facsimile: (802) 862-1176

with a copy to:

Catherine Kronk, Esq.
Murphy Sullivan Kronk
P.O. Box 4485
275 College Street
Burlington, VT 05406-4485
Telephone: (802) 861-7000
Facsimile: (802) 861-7007

This Notice is given pursuant to 27 V.S.A. § 341(c).

DATED as of the 1st day of November, 2013.

IN WITNESS WHEREOF, the Parties hereto have set their hands and affixed their respective seals the day and year first above written.

[Signature page to follow]

Landlord:

The City of Burlington

Witness

By: _____
Title: _____

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

At Burlington, in said County, on this ____ day of November, 2013, _____, Duly Authorized Agent of The City of Burlington, personally appeared, and he/she acknowledged this instrument, by him/her sealed and subscribed, to be his/her free act and deed of The City of Burlington.

Before me, _____
Notary Public
My commission expires: 2/10/15

Tenant:
41 Cherry Street, LLC

Witness

By: _____
Manager

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

At Burlington, in said County, on this ____ day of November, 2013, _____, Manager of **41 Cherry Street, LLC** personally appeared, and he acknowledged this instrument, by him sealed and subscribed, to be his/her free act and deed and the free act and deed of **41 Cherry Street, LLC**.

Before me, _____
Notary Public
My commission expires: 2/10/15

Exhibit "A"

Legal Description of Property and Leased Premises
41 Cherry Street, Burlington, Vermont

The Property or Leased Premises consist of:

1. Unit A of the Westlake Area Condominium as more fully described in the Master Declaration Westlake Area Condominium ("Condominium") dated July 27, 2005 and recorded in Volume 925 at Page 709 of the Burlington Land Records as amended by First Amendment to Master Declaration dated as of August 1, 2012 to be recorded in the City of Burlington Land Records ("Master Declaration"). All defined terms used below are as defined in the Master Declaration.

Without limiting the foregoing, it is noted that the Property is subject to and has the benefit of those easements and rights-of-way and covenants, as shown on said Plats and Plans and as set forth in the Master Declaration, including but not limited to the following:

The sixty (60) foot right-of-way for ingress and egress to Unit B and across Unit A is limited to ten (10) feet in height, and the owner of Unit A is granted the vertical air rights above the right-of-way and the right to develop or construct within those vertical air rights so granted; and

The horizontal boundaries of Unit A and Unit B are the above described metes and bounds, the upper vertical boundary is one hundred thirty feet (130') above the surface of the land and the lower vertical surface is fifty feet (50') below the surface of the land.

2. Easements upon and over Units B and C-2 and the Cherry Street right-of-way as shown on the plan attached hereto as Exhibit A-1, and described as follows:
 1. Easement over and upon Unit B being a twelve foot (12') by ninety five foot (95') easement as shown on the plan attached hereto as Exhibit A-1, which easement is for the purposes of constructing a building and improvements in the airspace above the existing wall of the garage on Unit B (elevation 196.97' +/- ASL) and to construct necessary footings and piers to support the structure to be built on Unit A and on or over the easements areas over or upon Units B and C-2; and
 2. Easement over and upon Unit C-2 measuring 17.27 feet by 72 feet, more or less, as shown on the plan attached hereto as Exhibit A-1, which easement is for the purposes of constructing a building and improvements in the airspace beginning approximately 7'2" above the finished grade of the existing ramp of the garage and to construct necessary footings and piers to support the structure to be built on Unit A and on or over the easements areas described.

3. Easement forty-nine feet (49') in length on the northerly boundary of Unit A and extending fourteen feet (14') over the Cherry Street public right-of-way and to be for the purposes of projections from Unit A, including, without limitation, for wall mounted signage, awnings and doors that may be constructed or installed from time to time, and footings.
 4. Easement forty-five feet (45') in length on the easterly boundary of Unit A and extending five feet (5') into the airspace of Unit B of the Westlake Area Condominium at least eight feet and four inches (8' 4") above the grade of the walkway between Unit A and what is now Macy's, which easement may be for the purposes of the construction, maintenance, repair and replacement of buildings and improvements attached to or a part of the buildings and improvements to be built on Unit A.
 5. Easement and right-of-way on, under and along the Cherry Street public right-of-way and on, under and along the walkway between Unit A and what is now Macy's, which is a portion of Unit B of the Westlake Area Condominium for the installation, operation, maintenance and repair of all utilities serving the Benefited Parcel, including without limitation water, sewer, stormwater, electricity, cable, fiber optics and telephone lines, pipes, poles and conduits, and all other utilities that are or may be laid, installed or constructed from time to time to serve Unit A, including without limitation those shown on the Plats and Plans attached to the Master Declaration of the Westlake Area Condominium.
 6. 2' X 60' easement for a foundation wall and overhead structure on Unit A onto Unit C-2, as is more particularly described in paragraph 6 of the First Amendment to Master Declaration Westlake Area Condominium dated as of the 1st day of August, 2012 and to be recorded in the City of Burlington Land Records contemporaneously herewith.
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3. An easement over and upon the Cherry Street public right-of-way, adjacent to the northerly boundary line of Unit A, for the construction, maintenance and use of an entranceway for vehicles for guests and invitees accessing the Building, as is more particularly shown on Exhibit A-2 attached hereto.
 4. An easement and right-of-way for the benefit of Unit A extending 46.33 feet by 60 feet from Unit A onto Unit C-3, as is more particularly described in paragraph 1 of the First Amendment to Master Declaration Westlake Area Condominium dated as of the 1st day of August, 2012 and to be recorded in the City of Burlington Land Records contemporaneously herewith.

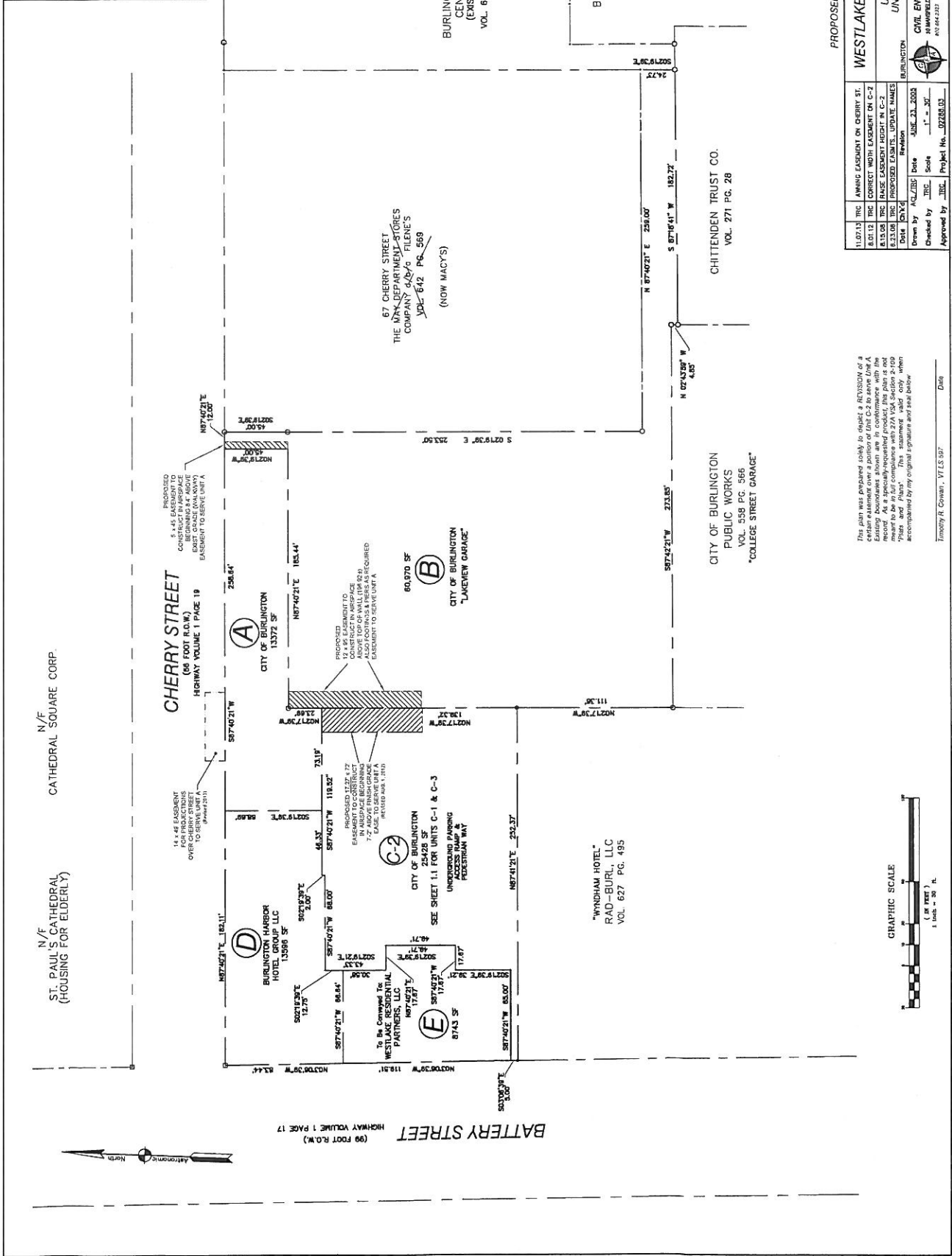
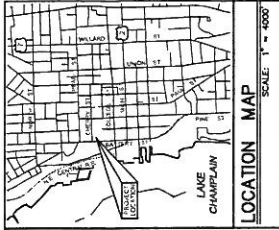
Unit A and the foregoing easements referred to herein as "the Property" or "Leased Premises".

Exhibit A-1
See Attached Plan

DRAFT

Exhibit A-2
See Attached Plan

DRAFT



PROPOSED ADDITIONAL EASEMENTS			
DATE	BY	DATE	BY
11.07.13	INC	AWING EASEMENT ON CHERRY ST.	
8.01.12	INC	CORRECT MATH EASEMENT ON C-2	
8.13.08	INC	BASE EASEMENT HEIGHT IN C-2	
8.13.08	INC	PROPOSED EASMENTS, UPDATE NAMES	
DATE	BY	DATE	BY
08.23.2003	Revision	08.23.2003	Revision
Drawn by	ALZ/JSB	Scale	1" = 30'
Checked by	JBC	Project No.	07288.03
Approved by	JBC		

This plan was prepared solely to depict a REVISION of a certain easement over a portion of Unit C-2 to serve Unit A. It is not intended to be a final plan for construction. As a specially required product, this plan is not meant to be in full compliance with 27A VSA Section 2-109 and 2-110. It is intended to be a preliminary plan, when accompanied by my original signature and seal before.

Timothy R. Cowan, V.T.L.S. 552



UNIT BOUNDARIES	
UNITS A, B, C-2, D, & E	
BURLINGTON	
CIVIL ENGINEERING ASSOCIATES, INC.	
30 WINDFORD NEW LANE SOUTH BURLINGTON VT 05403	
802.844.2337 FAX 802.844.2327	
www.caei.com	

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